



SUPREME COURT OF THE UNITED

STATES

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OCTOBER TERM, 1953

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No. 366

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UNITED STATES OF AMERICA, EX REL. JOSEPH  
ACCARDI,

*Petitioner,*

*vs.*

EDWARD J. SHAUGHNESSY, DISTRICT DIRECTOR OF THE  
IMMIGRATION AND NATURALIZATION SERVICE, NEW YORK  
DISTRICT, DEPARTMENT OF JUSTICE

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE SECOND CIRCUIT

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BRIEF FOR PETITIONER

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✓  
JACK WASSERMAN,  
*Attorney for Petitioner,*  
*Warner Building,*  
*Washington 4, D. C.*

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**Opinions Below**

The Court of Appeals affirmed the judgment of the District Court by a divided vote. The majority and dissenting opinions are reported at 206 F. 2d 897, and are set forth beginning at page 17 of the record. The District Court rendered no opinion.

## Jurisdiction

The judgment of the Court of Appeals was entered on August 11, 1953. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1). Certiorari was granted on November 16, 1953.

## Questions Presented

1. Where an alien is entitled to a deportation hearing conforming to procedural due process, and the administrative record, submitted to the Court, does not reveal *on its face* that matters outside that record were considered or that the case was prejudged, is he precluded from alleging and proving that his hearing was infected with the unfair utilization of confidential information and with prejudgment of his case?

2. Does a petition for a writ of habeas corpus state a cause of action where it alleges unfairness in a deportation hearing by reason of the use of confidential information, prejudgment of the case, and treatment of petitioner, different from all aliens similarly situated?

3. Upon an application for a writ of habeas corpus, may the Court go beyond the application and resolve disputed questions of fact in favor of the government, without affording the petitioner a hearing upon such disputed issues?

## Statutes and Regulations Involved

28 U. S. C. 2243 provides in part:

“A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

• • • • •

“Unless the application for the writ and the return

present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained."

Section 19(c) of the Immigration Act of 1917 [62 Stat. 1206; 8 U. S. C. 155 (c)], as amended provides in pertinent part as follows:

"In the case of any alien (other than one to whom subsection (d) is applicable) who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may (1) permit such alien to depart the United States to any country of his choice at his own expense in lieu of deportation, or (2) suspend deportation of such alien if he is not ineligible for naturalization or if ineligible, such ineligibility is solely by reason of his race, if he finds (a) that such deportation would result in serious economic detriment to a citizen or legally resident alien who is the spouse, parent, or minor child of such deportable alien; or (b) that such alien has resided continuously in the United States for seven years or more and is residing in the United States upon the effective date of this Act."

The Seventh Proviso of Section 3 of the Immigration Act of 1917 as amended (39 Stat. 875-878, 8 U. S. C. 136) provides in part as follows:

"Aliens returning after a temporary absence to an unrelinquished United States domicile of seven consecutive years may be admitted in the discretion of the Attorney General, and under such conditions as he may prescribe."

8 C.F.R. 150.7 (b) which was in force under the 1917 Immigration Act until November 10, 1950 provided in part as follows:

*"Eligibility for departure in lieu of deportation or for suspension of deportation. If the alien has applied for the privilege of departure in lieu of deportation or*

for suspension of deportation \* \* \* the presiding inspector shall follow his conclusions of law as to the alien's deportability with a discussion of the *evidence* relating to the aliens eligibility for such relief and his reasons for his proposed order. \* \* \*

8 C.F.R. 151.2 (c) ; 1951 Supp. reads in part :

“*Hearing officer: specific duties.* \* \* \* the hearing officer shall thereafter present all available evidence, including the interrogation of the alien and all witnesses presented concerning \* \* \* (4) factors bearing upon statutory eligibility for discretionary relief, \* \* \*

8 C.F.R. 151.5 (1951 Supp.) provides in part as follows :

“*Decision—(a) Preparation of written decision.* \* \* \* the hearing officer shall, as soon as practicable after the conclusion of the hearing, prepare in writing a decision, signed by him, which shall set forth a summary of the evidence adduced and his findings of fact and conclusions of law as to deportability. If the alien has applied for relief from deportation, the decision shall also contain a separate determination as to whether or not the hearing officer is satisfied, on the basis of the evidence presented, as to the alien's statutory eligibility for the relief requested. \* \* \* The hearing officer shall have no authority to exercise the Attorney General's powers under section 19 (c) (2) of the Immigration Act of 1917, as amended, or under the seventh proviso to section 3 of that act \* \* \*”.

Section 405(a) of Public Law 414 (66 Stat. 280), known as the Immigration and Nationality Act of 1952 provides :

“Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to affect the validity of any \* \* \* proceedings \* \* \* done or existing at the time this Act shall take effect; but as to all such \* \* \* proceedings \* \* \* the statutes \* \* \* repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect. \* \* \* An application for suspension of deportation under section 19 of the Immigration Act of 1917, as

amended, \* \* \* which is pending on the date of the enactment of this Act, shall be regarded as a proceeding within the meaning of this subsection."

### **Statement**

The petitioner seeks through this second application for a writ of habeas corpus to review the legality of a deportation order entered against him on April 3, 1953.

Petitioner asserts that he is a citizen of Italy, that he last entered the United States in 1932, and that he now has a residence of twenty-one years in the United States. He is married to a lawful resident of the United States, has a two year old American born child, and has been a person of good moral character for the past ten years (R. 2-3 Par. 2-7).

Petitioner has been ordered deported upon the ground that he entered the United States in 1932 without a visa (R. 2 Par. 4). The Immigration File of petitioner which was lodged with the Courts below reveals that the only adverse factors in his record were two arrests in 1933 and 1934 which did not result in convictions and a 1940 suspended sentence for violation of 18 U.S.C. 88. The allegation in the application of petitioner's good moral character for the past ten years (R. 3 Par. 7) was not only unopposed but was corroborated by a favorable finding in the decision of the Board of Immigration Appeals, dated April 3, 1953. Notwithstanding his good moral character, his long residence here and his family ties, the Board without assigning reasons, refused to exercise discretion to permit petitioner to remain in the United States as a permanent resident (R. 3 Par. 5). The instant application for habeas corpus alleges, as found by the court below (R. 20) the following new matters which were not presented in the first petition and which furnished a basis for the issuance of a second writ under 28 U.S.C. 2243, 2244:

(1) That the Attorney General maintains a confidential file relative to petitioner, that the government has included his name on a secret purge list, and that because of confidential information and other matters outside the record including the proscribed listing of his name by the Attorney General on October 2, 1952, petitioner was ordered deported in 1953. (R. 3-4 Par. 11-16).

(2) That the Attorney General decided to deport petitioner in October of 1952 and accordingly the case was prejudged in advance of the Board's decision of April 3, 1953. (R. 4 Par. 19).

(3) That notwithstanding the fact that the case was considered deserving of discretionary relief in 1945, and notwithstanding the fact that discretionary relief had been granted in all similar cases, it was denied in the instant case (R. 3 Par. 9-10).

In the District Court the respondent urged that the present writ herein should not issue because of the prior dismissal of the first application herein. Respondent also denied that matters outside the record were considered, that the case was prejudged, or that relief from deportation had been granted in all similarly situated cases (R. 5-7). The government did admit, however, in open court that the petitioner was on the so-called proscribed list of the Attorney General (R. 15). The District Court denied the application, not as a matter of discretion, but upon the ground that the allegations of the petition for habeas corpus, did not state a basis for the issuance of a writ (R. 15). Accordingly, the merits of the application rather than the lower courts' exercise of discretion were presented for review to the appellate court. *Salinger v. Loisel*, 265 U.S. 224,232.

The Court of Appeals affirmed in a divided opinion (R. 17). The majority decision, following *Alexiou v. McGrath*, 101 F. Supp. 421 (D. C. Dist. of Col. 1951) and *U. S. ex rel Weddeke v. Watkins*, 166 F. 2d 369 (C.A. 2, 1948), acknowl-

edges that the Immigration Regulations (8 C.F.R. 150.7 (b)) required a due process hearing upon the exercise of discretion to suspend deportation and grant petitioner permanent residence. It further assumes that matters outside the record may not be considered but decides that judicial intervention is only warranted (1) where administrative officials acknowledge utilization of off-the-record material and prejudgment of a case upon the record or file submitted to the court and (2) where allegations of such facts are not made upon information and belief. The majority opinion concludes that the allegation that all similarly situated cases have been granted permanent residence, is not a provable fact.

The dissenting opinion of Judge Frank takes sharp issue with these conclusions. He states (R. 27):

"There is no doctrine that a court may never go outside such an official record to discover whether an official himself unlawfully acted on matters outside the record. \* \* \* Ours would be a sorry legal system if it completely shielded from attack a judge's or other official's order simply because the facts revealing its illegality are not in the official record on which the order purports to rest. To confer such immunity would be to make legality a matter of sheer ritualism, of mere outward looks. That way lies tyranny."

Judge Frank asserted that petitioner was entitled to a hearing to establish the truth of the contentions in his application. The dissent considered the allegations made upon information and belief sufficient in conformity with the general practice to plead in this manner where a litigant lacks personal knowledge.

### **Summary of Argument**

1. The majority decision requires that administrative officials furnish evidence of their own improper conduct in their own decisions or in the particular file they choose to

lodge with the court. Upon their refusal so to do, as in the instant case where it is claimed that a due process deportation hearing was denied by utilization of confidential information, the majority below would deny judicial intervention. The dissenting opinion properly denies that this startlingly novel doctrine has any acceptance in the democratic processes of administrative law or federal practice. It finds that this tyrannical concept is contrary to the spirit and principle of *Universal Oil Co. v. Root Refining Co.*, 328 U.S. 575,580 (1946).

2. The Court below considered insufficient assertions in the habeas corpus application alleged upon information and belief. The dissent properly observed that this traditional manner of alleging facts not within the pleader's personal knowledge had been approved by the Supreme Court and in other circuits. *Berger v. United States*, 255 U. S. 22, 34-35 (1921); *Kelly v. United States*, 250 Fed. 947, 948-9 (C.A. 9, 1918); *Creekmore v. United States*, 237 Fed. 743 (C.A. 8, 1916); See also: *Shaw v. Protane Corp.*, 1 F. Supp. 980 (W.D. Pa., 1932); *Midwest Mfg. Co. v. Staynew Filter Corp.*, 12 F. Supp. 876, 880 (W.D. N.Y., 1935).

3. The Court below improperly considered insufficient the allegations that discretionary relief had been favorably exercised in similar cases. Without a hearing, and in the face of the Government's denial which raised an issue of fact, it concluded that these allegations were not provable. Discriminatory action of this character is provable and petitioner should have been accorded a hearing to establish his allegations. *U. S. ex rel. Knauff v. Shaughnessy*, 181 F. 2d 839 (C.A. 2, 1950); *Holiday v. Johnston*, 313 U.S. 342 (1941).

4. The decision below also accepted as an established fact, and in the absence of a hearing, the government's denial of prejudgment and utilization of confidential information. This amazing principle suspends the great writ

of habeas corpus. It resolves all disputed questions of fact in favor of the government, without a hearing and without permitting parties to submit proof of their contentions, contrary to this court's decisions in *Price v. Johnston*, 334 U. S. 266 (1948); *Walker v. Johnston*, 312 U. S. 275 (1941); *Holiday v. Johnston*, 313 U. S. 342 (1941); *Waley v. Johnston*; 316 U. S. 101 (1942); and *Cochrane v. Kansas*, 316 U. S. 255 (1942) and contrary to 28 U. S. C. 2243.

### ARGUMENT

The denial of the first writ herein was not *res judicata*. *Salinger v. Loisel*, 265 U. S. 224 (1924); *Wong Doo v. United States*, 265 U. S. 239 (1924).

Where the same grounds are urged in a second petition for habeas corpus, a court can refuse to rehear the matter. *U. S. ex rel McCann v. Thompson*, 144 F. 2d 604, 606 (C. A. 2, 1944). But where new grounds not previously urged are presented, or where the merits present a substantial question, the second petition has not been considered an attempt to abuse the great writ of habeas corpus. *U. S. ex rel McCann v. Thompson* (new grounds considered); *U. S. ex rel Gregoire v. Watkins*, 164 F. 2d 137 C. A. 2, 1947 (Writ granted on fourth application); *Shaughnessy v. Mezei*, 195 F. 2 964, C. A. 2 1952, reversed 345 U. S. 206 (Writ issued on fifth application).

Moreover, where, as in the instant case, the merits are considered by the District Court in refusing to issue a writ, the merits rather than the court's discretion are presented for review in the appellate court. *Salinger v. Loisel*, 265 U. S. 224, at 232.

In the instant case, one may search the first petition for allegations about the use of confidential material, material outside the record, allegations that the case was prejudged or that discretionary relief had been granted in similar

cases. The first petition did not state a claim for relief. It was properly denied.

The present petition does state a claim for relief. The District Court, treating the opposing affidavit as a motion to dismiss, held (R. 15) that relator was not entitled to a hearing upon these new allegations. In this, we submit that it erred. Factual issues could not be resolved at such stage of the proceedings. In undertaking to decide questions of fact upon oral argument and in holding that a case was not alleged upon the merits for the issuance of the writ, the courts below were in error.

# I

## **The Court of Appeals Erred in Its Refusal to Grant a Hearing upon the Claim of Improper Utilization of Matters Outside the Record.**

It is now well settled that judicial review is appropriate where the Attorney General commits an error of law in exercising his discretion, *McGrath v. Kristensen*, 340 U. S. 162 (1950); *deKonig v. Zimmerman*, 89 F. Supp. 891 (E. D. Pa., 1950), or where he abuses his discretion, *Knauff v. Shaughnessy*, 181 F. 2d 839 (C. A. 2, 1950); *Mastrapasqua v. Shaughnessy*, 180 F. 2d 999 (C. A. 2, 1950; *U. S. ex rel Adel v. Shaughnessy*, 183 F. 2d 371 C. A. 2, 1950); *U. S. ex rel Ciannamea v. Neely*, 202 F. 2d 289 (C. A. 7, 1953); *Caddeo v. McGrahner*, 202 F. 2d 807 (C. A. D. C., 1953). See also: *Vergas v. Shaughnessy*, 97 F. Supp. 335 (S. D. N. Y. 1951).

The petition herein alleges that confidential matters outside the record were utilized in deciding to deny discretionary relief herein, that the Attorney General had prepared a list of one hundred undesirables [on oral argument (R. 15)

respondent admitted that petitioner was on this list], and that the case was prejudged before decision by the Board of Immigration Appeals on April 3, 1953 (R. 3-4, Par. 11-20).

It is submitted that petitioner should have an opportunity to prove these allegations. If they are true, then there has been an unlawful exercise of discretion.

In opposing certiorari, the Government denied that the Court below held "that an administrative record fair on its face can never be attacked" (Brief in Opposition, p. 9). The opinion below does not support this view. Petitioner's interpretation is also the view of the dissenting member of the Court of Appeals (R. 26-27). The Court below said (R. 20-22) that the charges in the petition:

"\* \* \* were categorically denied in an opposing affidavit which also incorporated by reference the administrative record. There is absolutely nothing in that record to indicate that the administrative officials considered anything outside the record. \* \* \* As this court said in *United States ex rel. Kaloudis v. Shaughnessy*, 180 F. 2d 489, 490, an alien has no privilege of inquiring into the grounds on which the Attorney General has denied suspension of deportation; 'unless the ground stated is on its face insufficient, \* \* \*.' In this respect the case at bar is unlike *Alexiou v. McGrath* (D. C. D. C.), 101 F. Supp. 421, where it affirmatively appeared that evidence not of record was considered on the issue of eligibility for suspension of deportation."

If this language conveys any meaning at all, it is that an administrative record fair on its face, can never be attacked by proof that improper and illegal considerations motivated the denial of suspension of deportation. Petitioner proceeds on this assumption.

(A) *Evidence Dehors the Record May Be Shown to Establish a Denial of Due Process*

Judge Frank, properly observes (R. 24) that by "a valid regulation, having the effect of a law, the Attorney General has provided that one who applies for discretionary relief under the statute shall receive a hearing before the Board of Immigration Appeals on his appeal from a decision adverse to the applicant, made by the Commissioner or Acting Commissioner. \* \* \* If it can be shown that, as the relator alleged in the second petition for habeas corpus, the decision adverse to discretionary relief in *Accardi's* case was made by the Attorney General in 1952 before Accardi had had a Board hearing (in 1953), so that the purported Board hearing was but a sham, then it will appear that discretion has not been exercised as required by regulation. \* \* \* My colleagues say that 'there is absolutely nothing in the record to indicate that the administrative officials considered anything outside the record.' But the same was true in the *Root Refining* case (328 U. S. 575) \* \* \*. Moreover, relief by habeas corpus inherently involves judicial reliance on facts not in the record supporting the judgment which habeas corpus collaterally attacks."

We submit that Judge Frank's analysis and criticism of the majority opinion below is sound and irrefutable. Petitioner was entitled to a due process hearing pursuant to regulations which had the force and effect of law. *Bridges v. Wixon*, 326 U. S. 135, 153 (1945). To support his allegations that he was not accorded the hearing before the Board of Immigration Appeals which applicable regulations require, he could go outside the administrative record.

Evidence dehors the record is admissible to set aside a fraudulent judgment. *Bindczyck v. Finucane*, 342 U. S.

76 (1951); *Universal Oil Co. v. Root Refining Co.*, 328 U. S. 575 (1946); *United States v. Throckmorton*, 98 U. S. 61 (1878). If an alien were denied counsel or the right to call witnesses in his own defense against threatened deportation, there can be no doubt that evidence dehors the record could be searched to establish such due process denial. See *Kwock Jan Fat v.* 253 U. S. 455 (1920). Proof dehors the record is traditionally considered acceptable to show lack of due process in criminal cases. *Waley v. Johnston*, 316 U. S. 101, 104 (1942); *Cockrane v. Kansas*, 316 U. S. 255 (1942); *Price v. Johnston*, 334 U. S. 266 (1948); *Holiday v. Johnston*, 313 U. S. 342 (1941); *Walker v. Johnston*, 312 U. S. 275 (1941). It is evident that an administrative record in a deportation case is no more sacrosanct than a criminal adjudication. The novel and unusual doctrine of the court below should not be permitted to stand.

(B) *The Immigration Regulations Preclude Consideration of Matters Outside the Record*

In the case of *Marion Alexiou*, III, I & N Dec. 714 at page 716, the Board of Immigration Appeals stated in a case like the instant one where matters outside the record were presented for consideration of discretionary relief:

“An alien who is charged with being subject to deportation is accorded a hearing before an immigrant inspector, known as the Presiding Inspector, to determine, whether he is subject to deportation as charged (8 C. F. R. 150.6 (a), (b)). The Presiding Inspector is required to apprise the alien, *inter alia*, of his right to apply for suspension of deportation, if found deportable (8 C. F. R. 150.6(c)). At any time during the hearing the alien may give notice that he wishes to apply for such suspension (8 C. F. R. 156.6(g)). At the conclusion of the hearing the Presiding Inspector prepares a memorandum setting forth a summary of the evidence, his proposed findings of fact and con-

clusions of law and a proposed order respecting deportation (8 C. F. R. 150.7(a)(c)). If the alien has applied for suspension of deportation, the Presiding Inspector includes in his memorandum a discussion of the evidence relating to the alien's eligibility for such relief and states in numbered paragraphs his proposed findings of fact and conclusions of law with respect to such eligibility (8 C. F. R. 150.7(b))."

"The foregoing regulations have the force and effect of law and are binding upon the Immigration and Naturalization Service (*Bilokumsky v. Tod*, 263 U. S. 149, 155, 68 L. ed. 221, 224, 44 S. Ct. 54; *Bridges v. Wixon*, 326 U. S. 135, 153, 89 L. ed. 2103, 2114, 65 S. Ct. 1443; *Matter of J*—, A-4691768, Sept. 26, 1949). They impose a duty upon the Government to grant a fair hearing to an alien on the issue of his deportability (*The Japanese Immigrant Case*, 189 U. S. 86, 100-101, 47 L. ed. 721, 726; *U. S. ex rel Vajtauer v. Commissioner*, 273 U. S. 103, 106, 71 L. ed. 560, 563, 47 S. Ct. 302; *Whitfield v. Hanges* 222 F. 745, 749). They likewise impose a duty to accord a fair hearing to an alien on the issue of discretionary relief."

On November 16, 1949 the Attorney General approved the Board's decision. On December 17, 1949 without any explanation, the Attorney General reversed. III, I & N Dec. 718.

Thereafter, the case was taken into the District Court for the District of Columbia where the Attorney General's reversal was disapproved. Judge Youngdahl in *Alexiou v. McGrath*, 101 F. Supp. 421 (Dist. of Col., 1951) ruled as follows at page 424:

"Once the Attorney General has established the procedure affording an opportunity for a fair hearing as has been done here, then I do not believe his discretion can be exercised arbitrarily or capriciously in complete disregard of what appears on the record. These proceedings were infected with unfairness by a considera-

tion of matters outside the record. Any action based on such an unfair hearing is a nullity. If that were not so then we would be injecting into our own system of government the very principles of totalitarianism which we are today struggling to strike down." \* \* \*

"The hearing on eligibility for suspension is tainted, *ab initio*, with unfairness, because evidence not of record was considered. But for that evidence it is wholly speculative whether the requisite finding would have been made. See *Bridges v. Wixon*, *supra*. The charge of lack of due process cannot be avoided by a subsequent attempt at compartmentalization."

Deportation proceedings must be fair and consideration of *evidence* for discretionary relief is an integral part of the deportation hearing.

The administrative proceedings herein were instituted on October 21, 1947 (Appendix p. 32) and were therefore controlled by the Immigration Act of 1917 (8 U. S. C. 155-c-2) and the regulations promulgated thereunder (66 Stat. 280).

The regulations under the 1917 Immigration Act provided that the hearing officer should set forth in his opinion "a discussion of the *evidence* relating to the alien's eligibility for such relief (departure in lieu of deportation or suspension of deportation) and of his reasons for his proposed order." 8 C. F. R. 150.7(b); 1949 ed. Under a 1950 amendment to the regulations, it was specifically provided that the hearing officer should "present *all available evidence* \* \* \* concerning \* \* \* statutory eligibility for discretionary relief" [8 C. F. R. 151.2(c); 1951 Supp.]. "If the alien has applied for relief from deportation, the decision (of the hearing officer) shall also contain a separate determination as to whether or not the hearing officer is satisfied, *on the basis of the evidence presented*, as to the alien's statutory eligibility for the relief requested" 8 C. F. R. 151.5 (a); 1951 Supp.

If the alien is not granted discretionary relief, he is deported. Ever since *Kwock Jan Fat v. White*, 253 U. S. 455 (1920), it has been held that only matters of record must be considered, if a deportation hearing is to avoid the charge of unfairness.

Moreover the courts have almost uniformly assumed that only matters of record can sway discretion in deportation hearings.

In *U. S. ex rel Weddeke v. Watkins*, 166 F. 2d 369 (C. A. 2, 1948; cert. denied 333 U. S. 876) it was said:

"Since the regulations of the Attorney General have set up a quasi-judicial procedure for the determination of issues bearing on the propriety of exercising his power to suspend deportation under 8 U. S. C. A., section 155(c), we assume that the alien is entitled to procedural due process in the conduct of such hearing, and we assume further that, if the Immigration Service issues a warrant of deportation without according the alien such procedural due process, the warrant can be challenged on this ground in habeas corpus proceedings."

*Arakas v. Zimmerman*, 200 F. 2d 322, 324 (C. A. 3, 1952) states: "We agree entirely with the holding in *Alexiou v. McGrath*, D. C. 1951, 101 F. Supp. 421 \* \* \*".

In *U. S. ex rel Giacalone v. Miller*, 86 F. Supp. 655, 657 (S. D. N. Y. 1949) Judge Rifkind overruled whatever contrary opinion he might have expressed in *U. S. ex rel Von Kleczkowski v. Watkins*, 71 F. Supp. 429 (S. D. N. Y. 1947). In the *Giacalone* case, Judge Rifkind stated:

"\* \* \* It is now accepted that procedural due process must be observed in a hearing even though the alien is invoking relief which is, in any event afforded only at official discretion. See *United States ex rel. Weddeke v. Watkins*, 2 Cir. 1948, 166 F. 2d 369, 371, certiorari denied 1948, 333 U. S. 876, 68 S. Ct. 904, 92 L. Ed. 1152;

*Kavadias v. Gross*, D. C. N. D. Ind. 1948, 82 F. Supp. 716, 718."

*Kavadias v. Cross*, 82 F. Supp. 716, (N. D. Ind. 1948; reversed upon other grounds, 177 F. 2d 497) followed the rule of *U. S. ex rel Weddeke v. Watkins*, *supra*, that discretion must be exercised upon the evidence of record.

In the instant case, it is true as asserted by the Court below that the Board's decision does not state that confidential information was employed. But failure to mention it does not establish the point one way or the other. Petitioner can establish by documentary evidence that the Board of Immigration Appeals considers that petitioner is a racketeer. (See *infra*, Point II). The record of the administrative hearing and the Board's decision do not establish such conclusion but on the contrary affirmatively establish that petitioner has been for ten years and is now a person of good moral character. (Appendix, herein p. 34).

There was confidential information not of a security nature available to the Board,—this is undenied. If it was utilized, and that is the issue, it was used improperly. There is no point in having a hearing before the Board of Immigration Appeals, if its mind is made up in advance upon matters outside the record. Petitioner is entitled to a hearing to establish whether the Board acted improperly and contrary to regulations which have the force and effect of law.

(C) *Congress Did Not Authorize Utilization of Matter Outside the Record.*

In *U. S. ex rel Kaloudis v. Shaughnessy*, 180 F. 2d 489, 491 (C.A. 2, 1950) which did not involve matters outside the record, the Court observed that review of discretion was appropriate where its denial was "actuated by consideration that Congress could not have intended to make relevant."

Significantly, where Congress intended that matters outside the record be utilized it specifically authorized it or authorized regulations permitting its use. Such is the case of exclusions without a hearing. 8 U.S.C. 1225(c); *Knauff v. Shaughnessy*, 338 U. S. 53 (1950); *Shaughnessy v. Mezei*, 345 U. S. 206 (1953). Such is the case of detention of alien enemies who are not entitled to a hearing. *Ludecke v. Watkins*, 335 U. S. 160 (1948). However, where a hearing is authorized—and this is so even in the case of arriving aliens, it must be a fair hearing on record evidence. *Johnson v. Tertzag*, 2 F. 2d 40, 42 (C. A. 1, 1924); *U. S. ex rel., Brandt v. District Director*, 40 F. Supp. 371 (S. D. N. Y. 1941); Immigration and Naturalization Service *Monthly Review*, February, 1947, p. 101.

From 1917 until the *Alexiou* case in 1949 the statute and regulations herein were interpreted to require determinations of discretion to be made upon record evidence. This long standing administrative practice and contemporaneous interpretation is entitled to great weight. *United States v. American Trucking Association*, 310 U. S. 534, 549 (1940); *Billings v. Truesdale*, 321 U. S. 542, 552 (1944). It reflected the will of Congress when the 1917 Immigration Act and its 1940 amendment (54 Stat. 671, providing for suspension of deportation) were enacted. It is therefore submitted that this Court should affirm the doctrine enunciated in *U. S. ex rel. Weddeke v. Watkins*, *supra* and *Alexiou v. McGrath*, *supra*.

## II

### **The Court of Appeals Erred in Holding Insufficient Allegations upon Information and Belief**

In the District Court, the Government opposed the instant application for a writ of habeas corpus on the merits (R. 5). In the Court of Appeals, the same course was pursued. At

no time did the Government object to the fact that allegations of the complaint were made upon information and belief. Nevertheless, the majority of the Court of Appeals, held that "the assertion of a mere suspicion or 'belief' that the Board considered other matters did not require the issuance of a second writ" (R. 23). Here again, the Government in opposing certiorari, attempts to dilute the holding below, by the claim that the "majority does not hold, as petitioner claims (Pet. 8) that issues of fact may never be raised in a petition for habeas corpus by allegations on information and belief" (Brief p. 9). Here too, the dissenting member of the Court of Appeals confirms petitioner's interpretation. Judge Frank states (R. 29):

"Finally, I disagree with my colleagues when they say that no attention may be paid to the allegations of secret prejudgment by the Attorney General because it is made on information and belief. \* \* \* In a variety of circumstances, it has been held that such an allegation suffices where, as here, the asserted facts are thus not within affiant's personal knowledge."

(A) *Petitioner's Information and Belief.* The District Judge herein asserted that the existence of a confidential purge list was just one of counsel's ideas but a moment later Government counsel admitted the existence of the list and the fact that petitioner's name was included therein. (R. 15). The Court of Appeals in turn, asserted that prejudgment of the case on this ground was improperly alleged as a mere "suspicion". We submit that the facts of prejudgment are alleged positively and sufficiently in conformity with the cases noted below. We further submit that documentary proof will sustain the allegations of the petition.

On April 3, 1953, the Board of Immigration Appeals stated (Appendix p. 34 herein) as follows with reference to the petitioner:

“Affidavits of persons well acquainted with the alien, *character investigation by the Service*, and the testimony of four witnesses placed in this proceeding establish that the alien is considered a person of good moral character. (Emphasis supplied).

This is what the record evidence establishes according to petitioner's file lodged with the Court. The Department of Justice, however, does not consider the petitioner a person of good moral character, but on the contrary have been free in describing him as a “nationally known racketeer” and “hoodlum”. (Significantly, petitioner's name will not be found in the Kefauver Report, *Senate Report 307*, 82d Cong. 1st Sess.)

Professor Konvitz, in his recent book, *Civil Rights in Immigration*, (1953) observes: “That there are special drives against these persons (the foreign born) ought to be apparent to anyone who reads the newspapers” (p. 110). The background of this case can best be understood in the light of this current deportation drive. The public announcements of the Attorney General and the Department of Justice reports to the American public, like reports of government agencies to Congress (*United States v. Penn Foundry & Mfg. Co.*, 337 U. S. 198, 216; 1949) are appropriate subjects of judicial notice. There follows a chronological summary of pertinent public announcements of the Department of Justice as reflected in their official press releases:

*October 2, 1952:* The Attorney General announces his special drive to deport alien racketeers.

*April 3, 1953:* Announcement of Board of Immigration Appeals order of deportation against Joseph Accardi “known as a New Jersey racketeer”. This action was taken “under the current denaturalization and deportation program of Attorney General Brownell against top racketeers and subversives.”

*April 20, 1953:* Announcement of apprehension of

Joseph Accardi, "Newark, N. J. racketeer" for deportation on April 24, 1953.

*May 11, 1953:* Announcement of denial by Board of Immigration Appeals of motion by Joseph Accardi, "Newark, New Jersey racketeer, for reopening of his deportation case."

*May 20, 1953:* Release of speech of May 19, 1953 by Attorney General Brownell before the Stark County Division, Ohio Republican Finance Committee Dinner at Canton, Ohio. At page 8 of speech, the Attorney General stated:

"But here are a few examples of the thousands of decisions and actions the Department of Justice may be called upon to make in a single day: \* \* \* to initiate deportation proceedings against undesirables like Joseph Accardi \* \* \*".

*September 29, 1953:* Deputy Attorney General Rogers announces at the Annual Conference of District Directors of the Immigration and Naturalization Service that the number of racketeers against whom deportation and denaturalization proceedings have been brought has increased from 96 to 131.

*October 30, 1953:* Address of Assistant Attorney General in charge of the Criminal Division before the Chicago Crime Commission (pp. 10-11):

"The second area is one in which the Department of Justice has not only primary but exclusive jurisdiction—the field of denaturalizing and deporting gangsters and racketeers, who are foreign born and who because of their criminal activities, can make no claim to remain in the United States while violating its laws.\* \* \* To name but a few of the nationally known hoodlums who are the object of the program \* \* \* Joe Accardi \* \* \* and Joe Adonis of New York, have \* \* \* been ordered deported."

Professor Konvitz properly notes that "in the long run these drives against aliens and foreign born citizens have an evil effect upon the administration of justice" *Civil Rights in Immigration, supra*, p. 125. William Shannon,

in his series of articles which began in the New York Post on October 19, 1953 states in the same vein:

“Almost every day Attorney General Brownell announces the deportation of some alleged subversive or underworld figure. This great ‘cleanup drive’—it began before the Republicans took over, but they really went to town with it—seems likely to chalk up a higher box score than that of A. Mitchell Palmer during the ‘red scare’ days of 1919-20.

“When the clatter of the mimeograph machines in Brownell’s busy press office occasionally quiets down, however, it becomes clear that many innocent persons, some of them humble and friendless, have been trapped in Brownell’s legal machinery.”

We submit that when the proofs are in, it will be shown that Joseph Accardi was and is, in fact, a person of good moral character as found by the Board of Immigration Appeals and that he is one of the innocents caught in the current deportation drive. The anxiety of the Department of Justice to deport a racketeer<sup>1</sup> made petitioner the object of a hoax equalled by that of the Piltown man and “The Man Who Wouldn’t Talk”.

(B) *Sufficiency of Allegations Upon Information and Belief*. At the outset, one may well question the propriety of the action of the Court below in raising, *sua sponte*, the issue of the sufficiency of the allegations of the petition asserted upon information and belief. New issues may not be raised for the first time upon appeal. *Blair v. Oesterlein Mach. Co.*, 275 U. S. 220, 225 (1927); *United States v. Hillcrest Inv. Co.*, 147 F. 2d 194, 196 (C. A. 8, 1945). Objections in appellate courts which would dispose of a case on a tech-

<sup>1</sup> On April 27, 1953 the New York Times prematurely reported that Joseph Accardi was the first racketeer deported under the current deportation drive, and on September 23, 1953 Drew Pearson criticized the Department of Justice because it had only deported two criminals out of 133 in eight months.

nality of pleading are not favored. *Mitchell v. Wright*, 154 F. 2d 924, 926 (C. A. 6, 1946; cert. denied, 329 U. S. 733). This is especially true where as here, if the petition contained mere allegations of suspicion, it could have been amended to set forth positive assertions as counsel intended. This Court has appropriately commented that a "petition for habeas corpus ought not to be scrutinized with technical nicety. Even if it is insufficient in substance it may be amended in the interest of justice." *Holiday v. Johnston*, 313 U. S. 342, 350 (1941). However, it is submitted that the petition did assert facts in a positive and proper manner. Pleadings under our present form of simplified practice are required to allege the ultimate facts which a plaintiff must prove in order to establish his case. *Mum v. Decker & Sons*, 301 U. S. 168 (1937). Their function in a lawsuit is to inform the court and adverse parties of the facts in issue so the court may declare the law and adversaries may know what to meet by proof. *Twachtman v. Connelly*, 106 F. 2d 501, 505 (C. A. 6, 1939). Rule 8 of the Rules of Civil Procedure, requiring merely a "plain statement of the claim" was intended to avoid technicalities. "Under the new rules it is very difficult for counsel to draft a pleading so badly as to lose the rights of his clients". Barron & Holtzoff, *Federal Practice and Procedure*, Volume 1, pp. 415-416, 431-432. The Court below, nevertheless, stressed a technicality in the pleading.

Under Rule 24(a) of the Rules of the Southern District of New York, habeas corpus petitions in immigration cases must be verified by the petitioner or a person authorized to act for the alien. Obviously, such individuals can not always have personal knowledge of the facts which underlie the claim for relief. The problem is illustrated by *Berger v. United States*, 255 U. S. 22, 34-35 (1921). Defendants in a criminal trial filed an affidavit of prejudice, pursuant to

Section 21 of the Judicial Code (36 Stat. 1090), alleging that they were of German birth and upon information and belief that Judge Kenesaw Mountain Landis had made anti-German statements and was therefore prejudiced against Germans. In upholding the sufficiency of these allegations, this Court said:

“We concede that § 21 is not fulfilled by the assertion of ‘rumors or gossip’, but such disparagement cannot be applied to the affidavit in this case. Its statement has definite time and place and character, *and the value of averments on information and belief in the procedure of the law is recognized.* To refuse their application to § 21, would be arbitrary and make its remedy unavailable in many, if not in most cases. The section permits only the affidavit of a party \* \* \*. \* \* \* it cannot be the assumption of § 21 that the bias or prejudice of a judge in a particular case would be known by everybody and necessarily, therefore, to deny to a party the use of information received from others is to deny to him at times the benefit of the section.” (Emphasis supplied.)

Similarly in *McQuillen v. National Cash Register Co.*, 22 F. Supp. 867 (D. C. Md., 1938), a stockholder’s complaint containing allegations upon information and belief was held sufficient. The Court said at page 876:

“Furthermore, while, as a general rule, whatever is essential to the right of the complainant to maintain a bill in equity is necessarily within his knowledge, and therefore ought to be alleged not on information and belief, but positively and with precision; nevertheless, this requirement presupposes that the facts are known to the plaintiff personally. In any case, therefore, where the matters are not within the knowledge of the plaintiff, he may allege the facts on information and belief, because clearly no rule of pleading should be permitted to defeat the right of a person to sue merely because he is lacking in personal knowledge of *all* of the

facts and may not be able to swear that *all* essential facts were known to him. See *Leavenworth v. Pepper*, C. C., 32 F. 718; *Murray Company v. Continental Gin Company*, C. C., 126 F. 533; *Helmet Company v. Wrigley Company*, 6 Cir., 245 F. 824; *Moore v. New York Cotton Exchange*, 2 Cir., 296 F. 61, affirmed in 270 U. S. 593, 46 S. Ct. 367, 70 L. Ed. 750, 45 A. L. R. 1370; *Boyd v. Nebraska ex rel. Thayer*, 143 U. S. 135, 146, 181, 12 S. Ct. 375, 36 L. Ed. 103. We conclude that the allegations in the present bill of complaint satisfy the requirements of Equity Rule 25, since the transactions complained of are peculiarly within the knowledge of the defendants rather than of the plaintiffs."

Allegations upon information and belief have been held sufficient in actions for contempt, *Kelly v. United States*, 250 Fed. 947, 948 (C. A. 9, 1918); *Creekmore v. United States*, 237 Fed. 743 (C. A. 8, 1916); *Emery v. State*, 78 Neb. 547 (1907); *Hughes v. Territory*, 10 Ariz. 119, 127 (1906); *State ex rel. Porter v. First Judicial District*, 123 Mont. 447, 456 (1950); for negligence, *Shaw v. Protane Corp.*, 1 F. Supp. 980 (W. D. Pa., 1932); *Reed v. Mai*, 171 Kan. 169 (1951); *Colton v. Foulkes*, 259 Wise. 142, 146 (1951); for patent infringement, *Wyckoff et al. v. Wagner Typewriter Co.*, 88 Fed. 515 (S. D. N. Y., 1898); *Elliot & Hatch Book Typewriter Co. v. Fisher Typewriter Co.*, 109 Fed. 330 (S. D. N. Y., 1901); *Murray Co. v. Continental Gin Co.*, 126 Fed. 533 (C. C. Del., 1903); *Midwest Mfg. Co. v. Staynew Filter Corp.*, 12 F. Supp. 876, 880 (W. D. N. Y., 1935); for unfair competition, *Helmet Co. v. Wm. Wrigley, Jr., Co.*, 245 Fed. 820, 824 (C. A. 6, 1917); for libel, *Pridonoff v. Balokovich*, 36 Cal. 2d 788, 792 (1951); for fraud, *Wells v. Bridgeport Hydraulic Co.*, 30 Conn. 316, 323 (1862) and in other forms of equitable proceedings, *Nance v. Daniel*, 183 Ga. 534, 538 (1936); *Allen v. Allen*, 196 Ga. 736, 747, 748 (1943); *Drener v. Mercantile Trust & Deposit Co.*, 115 Ala. 592, 560 (1896).

It is submitted that if allegations upon information and belief are proper in this variety of situations including a charge of bias against a judge, then allegations of denial of due process by the Attorney General may likewise be made upon information and belief especially where the facts of prejudgment and the existence of a confidential purge list are peculiarly within his knowledge, and not within the personal knowledge of petitioner.

### III

#### **The Court of Appeals Erred in Holding Insufficient Allegations That Discretionary Relief Had Been Granted in All Similar Cases.**

The majority of the Court below (R. 23) and the Government in its brief in opposition to certiorari (p. 10) claim insufficient the allegations of the petition (R. 3, Par. 8) that in all similar cases involving persons of good moral character, with long residence and family ties in the United States, discretionary relief had been extended. It is asserted that this allegation is not a provable fact.

(A) *Lack of Findings.* The administrative file herein will disclose, that the hearing officer, the Assistant Commissioner, and the Board of Immigration Appeals merely concluded, without disclosing the basis therefor, that discretion should not be exercised favorably. Nowhere is the basis for the denial of discretionary relief explained in the Board's decision. Moreover, the regulations contemplate findings upon the subject of discretion. 8 C.F.R. 150.7(b).

In *S.E.C. v. Chenery Corp.*, 318 U.S. 80, at 94, (1943) the Supreme Court said:

" . . . the orderly functioning of the process of review requires that the *grounds upon which the administrative agency acted be clearly disclosed and adequately sustained.*" (Emphasis supplied.)

In *Florida v. United States*, 282 U.S. at 215 (1931) this Court said:

"The question is not merely one of the absence of elaboration or of a suitably complete statement of the grounds of the Commission's determination, \* \* \* but of the lack of the basic or essential findings required to support the Commission's order. In the absence of such findings, we are not called upon to examine the evidence as to what it shows or to spell out and state such conclusions of fact as it may permit. The Commission is the fact-finding body and the court examines the evidence not to make finds for the Commission but to ascertain whether its findings are properly supported."

See also: *Beaumont, S. L. & W. R. Co. v. United States*, 282 U.S. 74 (1930); *United States v. Interstate Commerce Commission*, 198 F. 2d 958 (C.A.D.C., 1952); *Davis, Administrative Law* (1951) p. 561.

In failing to disclose the basis for its decision on discretionary relief, the Board of Immigration Appeals acted contrary to law.

(B) *Conduct in Similar Cases.* Paragraph 8 of the petition herein (R. 3) alleges that in "all similar cases the Board of Immigration Appeals has exercised favorable discretion and its refusal to do so herein constitutes an abuse of discretion." This is borne out by the test applied to these cases in decisions of the Board of Immigration Appeals.

It is undisputed that the Board of Immigration Appeals had power to grant permanent residence to petitioner either by ordering suspension of deportation [8 U.S.C. 155(c)(2)] or through a procedure known as seventh proviso and pre-examination (8 U.S.C. 136; 8 C.F.R. 142; *Matter of Sam and Sarra C.* —, I-, I & N Dec. 525; *Matter of A.* —, II, I & N Dec. 459.) The factors to be considered in the grant of discretion in cases like that presented here, are enunciated by

the Board of Immigration Appeals in *Matter of L.* —, III, I & N Dec. 767 at 770. They are:

- “(1) Whether there has been genuine reformation;
- (2) The family ties of the alien in the United States;
- (3) The seriousness of the crime or crimes to be waived under the seventh proviso; and
- (4) The period of residence of the alien in the United States.”

See also: *Matter of V.* —, III, I & N Dec. 571.

The record of the administrative hearing herein shows (1) reformation and good moral character for ten years; (2) that the relator has a wife and two-year-old child here; (3) that his conviction was not serious, especially in view of the suspended sentence given to him; (4) that he has a twenty-one year residence here.

That the respondent denies petitioner's allegation does not conclude the issue. It is a matter of proof and should be established or refuted at a hearing which the District Court denied to the petitioner.

The allegation clearly states a claim for relief. In *U. S. ex rel Knauff v. Shaughnessy*, 181 F. 2d 839 (C.A. 2, 1950), the court said:

“8 U.S.C.A. § 154 gives the Attorney General discretion to determine when immediate deportation is not . . . proper’. By the adoption of an ‘invariable practice’, he has established a class of situations with respect to which he has always so exercised that discretion as to suspend deportation. That classification is entirely reasonable. To depart from it in a single instance is to act arbitrarily or capriciously, to abuse administrative discretion.”

The court's ruling, *supra*, was confirmed by Justice Jackson who granted a stay to Ellen Knauff, 182 F. 2d 1020. Justice Jackson's unreported opinion (set forth in *The Ellen Knauff Story*, pp. 152, 154) states:

"Nothing has been produced to show why this particular petitioner should be so discriminated against (deported pending judicial review). To stand between the individual and arbitrary action by the Government is the highest function of this Court."

It is submitted, that under the allegations of the petition, petitioner should be allowed to show that respondent acted arbitrarily herein and abused his discretion.

#### IV

##### **Petitioner Is Entitled to a Hearing**

The decision below is in direct conflict with the mandate of 28 U. S. C. 2243 which requires that an application for a writ should be signed or entertained "Unless it appears from the *application* that the applicant or person detained is not entitled thereto." In the Second Circuit, the practice has developed for the government to submit opposing affidavits, as it did here, to writ applications. The decisions below were not made upon the *application* alone, as required, but by accepting the disputed facts alleged in the opposing affidavit. Accordingly no writ was issued and no hearing was held. This practice in the Second Circuit, violative of 28 U. S. C. 2243, drastically curtails the important writ of habeas corpus. It presents an unauthorized procedure which should be permitted to stand.

The decision below accepted as an established fact, and in the absence of a hearing, the government's denial of prejudgment and utilization of confidential information. It also decided without any proof or hearing, that petitioner's allegation that his case was treated differently from all similar cases, was not a provable fact. This amazing principle suspends the great writ of habeas corpus. It resolves all disputed questions of fact in favor of the government,

without a hearing and without permitting parties to submit proof of their contentions.

In *Price v. Johnston*, 334 U. S. 266, 291 (1948) this Court observed: "Appellate Courts cannot make factual determinations which may be decisive of vital rights where the crucial facts have not been developed." To the same effect as to requirements of a hearing on disputed facts are: *Walker v. Johnston*, 312 U. S. 275, 285, 287 (1941); *Holiday v. Johnston*, 313 U. S. 342, 350 (1941); *Waley v. Johnston*, 316 U. S. 101 (1942); *Cochrane v. Kansas*, 316 U. S. 255; (1942); *Stewart v. Overholzer*, 186 F. 2d 339, 342 (C. A. D. C., 1950). The doctrine applies even though the appellate court might, as did the majority below, consider the allegations improbable or incapable of proof. *Holiday v. Johnston*, *supra*, *Waley v. Johnston*, *supra*.

Petitioner should be granted a hearing, as Judge Frank indicated (R. 29) so that he may have an opportunity to prove the allegations of his claim.

### Conclusion

If the fate of the petitioner alone were to be decided by this case, it would be of small moment. Hysteria impels people to destroy the very thing they are struggling to preserve. The hysteria whipped up by the Department of Justice in this case, should not permit us to lose sight of the democratic way that administrative agencies should function. The power of the Attorney General over resident aliens

"is a power to be administered, not arbitrarily or *secretly*, but fairly and openly under the restraints and principles of free government applicable where the fundamental rights of men are involved, regardless of their origins or race. It is the province of the courts, in proceedings for review \* \* \* to prevent abuse of this extraordinary power, \* \* \* " *Kwock Jan Fat v. White*, 253 U. S. 454, 464 (1920).

To prevent abuse of the Attorney General's extraordinary powers over the lives and destinies of our foreign born, judicial intervention is appropriate herein. Petitioner should be accorded a hearing to permit him to establish his charges. The decision below should be reversed with directions that the writ of habeas corpus issue.

Respectfully submitted,

JACK WASSERMAN,  
*Attorney for Petitioner,*  
Warner Building,  
Washington 4, D. C.

## APPENDIX

### DECISION OF BOARD OF IMMIGRATION APPEALS

File: A-4373872—New York.

April 3, 1953

In re: JOSEPH ACCARDI OR GIUSEPPE ACCARDI.

In Deportation Proceedings.

In Behalf of Respondent: Herbert C. Smith, Esq., 1122 South Orange Avenue, Newark 6, New Jersey. (Heard November 26, 1952.) (Three other persons—respondent and relatives.)

#### CHARGES:

Warrant: Act of 1924—no immigration visa.

Lodged: Act of 1917—sentenced for crime committed within 5 years after entry, to wit: Conspiracy to defraud the U. S. (18 U.S.C. 88).

#### APPLICATION:

Suspension of deportation—economic detriment; or voluntary deportation, preexamination and the discretion contained in the 7th Proviso.

#### DETENTION STATUS:

Released under Bond.

This record relates to a 42-year-old alien, native and citizen of Italy, whose last and only entry to the United States occurred at Buffalo, New York during the month of August 1932, at which time he entered this country to remain permanently. He was not in possession of an unexpired immigration visa. The warrant of arrest was issued October 21, 1947 and, after appropriate hearing, the alien was found deportable on the charge in the warrant of arrest. The proceedings were reopened by the Assistant Commissioner on January 28, 1952, to receive further evidence concerning the application for discretionary relief.

The reopened hearing was accorded in April 1952, after which the Hearing Officer denied discretionary relief and entered an order for deportation on the charge in the warrant of arrest. On July 7, 1952, the Acting Assistant Commissioner considered the case, denied discretionary relief,

ordered deportation solely on the charge in the warrant of arrest, and certified the case to this Board for final decision.

No issue is raised in this case relative to deportability which is solely on the charge in the warrant of arrest. The charge lodged in the proceedings is not sustained. This charge was predicated on the conviction of the alien in 1941 for conspiracy to defraud the United States in violation of Title 18, U.S.C. 88, which overt acts occurred between January 1934 and January 1937. The alien received a suspended sentence of 24 months.

This record shows that this alien was granted the privilege of preexamination on April 6, 1945. Thereafter, the American Consul at Montreal, Canada declined to consider his application for an immigration visa because of the alien's conviction for conspiracy to defraud. As previously stated the warrant of arrest was issued on October 21, 1947.

Counsel has appeared in oral argument and has insisted that there is no positive proof of any acts of misconduct on the part of this alien during the past five years, that should operate to preclude the granting of discretionary relief.

This alien has been living in the United States for a period of 21 years. He is married to a legally resident alien and has one infant child born in this country in 1951. The spouse and child are dependent on the alien for support. It is stated that the alien's spouse is a petitioner for naturalization.

The respondent alleges that he is worth between \$15,000 and \$20,000 (p. 22-a). Evidentiary data in the record is to the effect that the subject has been engaged in the sale or transfer of real estate and has received some income in the nature of commissions on the sales. The alien has testified that he is part owner of certain properties some of which he is trying to sell. He also owns a farm equipped with machinery and stocked with livestock, worth about \$40,000. He receives a salary of \$130 per month for collecting rents for his sister-in-law and about \$100 per month for collecting rents on other properties.

The record shows that the father of this alien came to the United States in 1939, and thereafter conveyed assets or property of the value of \$50,000 to his daughter-in-law as gifts. This alien alleges that he has supported his father

since 1946. During the period since the date last mentioned, at least, the alien has claimed his father as a dependent in income tax returns. The alien offers as an explanation the excuse that his father is unable to maintain himself due to ill health.

Affidavits of persons well acquainted with the alien, character investigations by the Service and the testimony of four witnesses placed in this proceeding establish that the alien is considered a person of good moral character. The facts stated by the character witnesses have been discussed by the Hearing Officer in his decision. As previously stated, the alien has been the subject of warrant proceedings during the past 5 years.

This respondent has been arrested on several occasions between 1933 and 1940 or 1941. He was arrested in 1933 and charged with being a disorderly person; in 1934 for possession of lottery chips and violation of the liquor laws, respectively; and in 1940-1941 for conspiracy to defraud the United States which acts were committed between 1934 and 1937.

Relief from deportation is a matter of administrative discretion and not a matter of right. This alien has been in the United States several years, and although he was granted preexamination in 1945, he has been unsuccessful in the adjustment of his immigration status. After consideration of all the facts and circumstances in the case, we believe that the applications for relief should be denied as a matter of administrative discretion.<sup>2</sup>

Order: It is ordered that the alien's applications for discretionary relief be denied.

It is further ordered that the decision of the Hearing Officer in this case which was adopted and certified to this Board for final decision by the Assistant Commissioner on January 28, 1953, be and the same is hereby affirmed.

\_\_\_\_\_,  
Chairman.

<sup>2</sup> *U. S. ex rel. Weddeke v. Watkins*, 166 F. 2d 369; and *Kaloudis v. Shaughnessy*, 180 F. 2d 489.

